

FILED

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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BALWANT SINGH,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-76325

Agency No. A77-382-063

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted June 12, 2006 ^{**}

Before: KLEINFELD, PAEZ, and BERZON, Circuit Judges.

Balwant Singh, a native and citizen of India, petitions for review of the Board of Immigration Appeals' ("BIA") order denying as untimely his motion to reopen removal proceedings. To the extent we have jurisdiction, it is conferred by

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

8 U.S.C. § 1252. We review for abuse of discretion, *see Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005), and we deny in part and dismiss in part the petition for review.

The BIA acted within its discretion in denying Singh's motion to reopen as untimely because Singh filed his motion almost two years after the BIA's decision. *See* 8 C.F.R. § 1003.2(c)(2) (motion to reopen must be filed within ninety days of BIA's decision). Furthermore, without deciding whether polygraph tests are admissible, we note that the polygraph test results Singh submitted could have been procured within the time limit for filing a motion to reopen.

Singh's "miscarriage of justice" argument is unavailing because he has failed to show the BIA erred in denying his motion to reopen as untimely. *See Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (explaining that petitioner must show error to prevail on a due process challenge).

We lack jurisdiction to review Singh's contention that the BIA should have sua sponte granted his motion to reopen despite its untimeliness, because the decision of the agency whether to invoke its sua sponte authority is committed to

its unfettered discretion. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002)
(internal citations omitted).

PETITION FOR REVIEW DENIED in part, DISMISSED in part.